REMARKS

This Response is submitted in response to the Office Action mailed on August 4, 2004. The Office Action notes that the terminal disclaimer filed on April 26, 2004 has not been approved, rejects Claims 1-10 under the judicially-created doctrine of obviousness-type double patenting in view of one issued patent and one pending patent application and rejects the claims under 35 U.S.C. § 103.

Applicants are submitting herewith a terminal disclaimer that Applicants believe overcomes the double patenting rejection. Therefore, Applicants respectfully request that the obviousness-type double patenting rejection be withdrawn.

Claims 1-10 stand rejected under 35 U.S.C. § 103 based on the same references and "for the reasons detailed in the Office Action mailed 8/29/00, 4/3/01, and 7/31/02." Applicants respectfully submit that this rejection is improper for the following reasons.

The instant Office Action fails to note that there was a previous Office Action that is not even references in the instant Office Action. In this regard, an Office Action was issued by the U.S. Patent Office on February 4, 2004. In that Office Action, Claims 1-10 were rejected based on the same references cited in the instant Office Action and "for reasons detailed in the Office Action mailed 8/29/00, 4/3/01, and 7/31/02." However, the Patent Office in that Office Action stated as follows:

> However, with the art taken as a whole does not appear to teach, but what is not claimed, is a retorted layered canned pet food and process of making that at initial filling and due to the density and viscosity of the mixture of the solid food pieces and gravy, and the density and viscosity of the settable food off, clear and distinct layers are formed in the can with the upper layer being on the lower layer and wherein the retorted can contains a base layer that comprises solid food pieces in a gravy that is thin and runny (page 8, paragraph 3 and 4), that is one that is easily flowable, and that has its viscosity decreased due to the heat during retorting, and an upper layer of the substantially solid foodstuff, which retorted layers maintain their clear and distinct configuration. As noted above, support for these concepts comes directly from page 8, paragraph 2 and 3 of applicants specification. An amendment adding these concepts to claims 1 and 10 would place this application in a condition for allowance if filed with a proper terminal disclaimer.
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> See page 5 of the Office Action dated February 4, 2004.

Accordingly, Applicants in response to that Office Action, amended Claims 1 and 10 to, in Applicants' belief, add the limitation that the Patent Office stated would avoid the prior art. Therefore, Applicants believed they had placed the claims in a condition for allowance.

But, it is respectfully submitted, that the Patent Office has ignored this amendment and indeed appears to have ignored the last Office Action. Applicants do not believe this is proper nor is it fair to Applicants. The Patent Office stated that if certain amendments were made to the claims, the claims would be in a condition for allowance. Applicants made these amendments to the claims and now the same references are relied upon to reject the claims as if the Office Action of 2/4/04 never occurred.

Applicants respectfully request that the Patent Office consider the previous Office Action as well as the amendments to the claims. Applicants believe that if these amendments are considered the application will be deemed to be in a condition for allowance and Applicants therefore respectfully request it be passed to allowance.

For the foregoing reasons, Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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